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No. 99-784

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION,
Petitioner,

v.

DOUGLAS J. AXEN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

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BRIEF IN OPPOSITION

JOHN PAUL GRAFF
GRAFF & O'NEIL
2121 S.W. Broadway, Suite 100
Portland, Oregon 97201
(503) 222-4545

JEFFREY B. WIHTOL *
JEFFREY B. WIHTOL, ESQ.
2121 S.W. Broadway, Suite 100
Portland, Oregon 97201
(503) 228-1210
Attorneys for Respondent

* Counsel of Record

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LIST OF PARTIES

Contrary to the caption of the petition, the State of Oregon is not a respondent in these proceedings. Rule 12.6. See, discussion at pages 3-4, *infra*. The only parties are petitioner American Home Products Corp. and respondent Douglas J. Axen.

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BRIEF IN OPPOSITION

Respondent Douglas J. Axen submits this brief in opposition to the petition for a writ of certiorari filed by petitioner American Home Products, Inc. in this case.

STATEMENT OF THE CASE

A. Introduction and Background.

This case is not an appropriate vehicle for addressing either question presented by petitioner. As a result of a recent development in Oregon law, the award of punitive damages in this case may not raise any Eighth Amendment issue at all. Oregon's punitive damages split-recovery statute, Or. Rev. Stat. § 18.540, has been held to violate the takings clause, Article I, Section 18, of the Oregon Constitution in another case, and the matter is currently on appeal to the Oregon Court of Appeals.[1] If that ruling is affirmed, the Excessive Fines Clause does not apply to punitive damages awards in civil actions between private litigants in Oregon because the government neither seeks to impose a monetary sanction on an individual nor is entitled to a share of the damages awarded. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 272, 275-76 (1989).

In addition, the trial court's failure to state reasons for affirming the punitive damages award does not present a substantial federal question. Not only did petitioner fail to request an explanation from the trial court, but a plurality of this Court has already held that a trial court's failure to articulate reasons for affirming a punitive dam-

[1] The split-recovery statute in effect at all times material to these proceedings is Or. Rev. Stat. § 18.540 (1991). That statute is correctly reproduced in the appendix to the petition at A. 59a-61a. There, however, it is incorrectly designated "Or. Rev. Stat. 61a. It is incorrectly designated "Or. Rev. Stat. § 18.540 (1987)." Unless indicated otherwise, all references to Or. Rev. Stat. § 18.540 in this brief are to the 1991 version of the statute.

ages award challenged on grounds of excessiveness is not a constitutional violation. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465 (1993) (opinion of Stevens, J.).

1. Petitioner's statement of facts is incomplete and misleading. When the circumstances giving rise to the jury's award of damages are properly understood, it is plain that this case presents no constitutional issue warranting review by this Court. Based on those circumstances, the Court of Appeals of Oregon held that there was sufficient evidence to support an award of punitive damages to respondent and that $20 million was not an excessive award under *BMW of No. America, Inc. v. Gore*, 517 U.S. 559 (1996). Petitioner does not challenge those rulings here.

In August, 1994, respondent, then age 56, was diagnosed as having a heart condition for which his cardiologist prescribed amiodarone, a drug distributed by petitioner in the United States and Canada under the trade name of Cordarone. A. 4a. In September, respondent first noticed changes in his vision but did not associate them with amiodarone. A. 4a; Tr. 869. Respondent's sight deteriorated further in October, and he complained about the problem to his cardiologist. A. 4a; Tr. 870, 1783. The cardiologist referred respondent to an ophthalmologist, who discovered optic nerve swelling and hemorrhaging in each eye and recommended that respondent discontinue taking amiodarone. A. 4a; Tr. 1783, 1750-52. On November 7, 1994, respondent stopped using the drug on instructions from his cardiologist. A. 5a; Tr. 870-72, 1794. Respondent's vision continued to deteriorate to the point where he became legally blind. A. 5a; Tr. 626-27, 822, 1753-55; PX. 1, 30. Respondent was eventually diagnosed as suffering from amiodarone-induced toxic optic neuropathy, which caused irreversible degeneration

and atrophy of the optic nerve in each eye. A. 5a; Tr. 1753-1755.

2. Respondent commenced this action against petitioner, the State of Oregon, and Wal-Mart Stores, Inc., in the Circuit Court for Multnomah County, Oregon, seeking compensatory and punitive damages.[2] The State, which operated the hospital where respondent's treating physicians practiced, and Wal-Mart, which sold the drug to respondent, were dismissed as parties before trial, and they took no further part in the proceedings. The jury awarded respondent $1,907,265.75 as compensatory damages and $20 million as punitive damages. Judgment was entered on the verdict. The judgment designated the State of Oregon as a judgment creditor with respect to a portion of punitive damages, as required by Or. Rev. Stat. § 18.540. A. 53a. The trial court denied petitioner's post-verdict motions for new trial challenging the amount of punitive damages as excessive. A. 58a. The Court of Appeals of Oregon affirmed the judgment, A. 47a, 52a, and the Supreme Court of Oregon declined to review that decision. A. 1a.

The State of Oregon was not designated as an adverse party in petitioner's notice of appeal.[3] Respondent filed a notice of cross-appeal challenging the constitutionality of the split-recovery statute, Or. Rev. Stat. § 18.540. The State was designated as the adverse party in the cross-

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[2] Respondent's wife, Sandra Axen, was also a plaintiff in that action. She was awarded $936,392 as damages for loss of consortium, which the court of appeals reduced to $500,000. Her portion of the judgment is not an issue in this Court.

[3] Although the State had been dismissed from the action, it continued to be designated as a defendant in the title of the action. Under Oregon law, a notice of appeal must contain the title of the action designating all of the parties named in the trial court. Or. Rev. Stat. § 19.250(1). Petitioner's notice of appeal accordingly designated the State of Oregon as a defendant but not as an adverse party in the appeal.

appeal. Upon a joint motion by respondent and the State to which petitioner did not object, the cross-appeal was dismissed for want of appellate jurisdiction on the grounds that a justiciable controversy did not yet exist between respondent and the State on the constitutionality of Or. Rev. Stat. § 18.540. After the cross-appeal was dismissed, the State took no further part in proceedings before the Court of Appeals of Oregon and the Supreme Court of Oregon. It, like Wal-Mart Stores, Inc., was designated a defendant in the decisions of those courts. A. 1a, 2a. Therefore, Oregon was not a party to the appeal in the state courts and, contrary to the caption of the petition here, is not properly a party to the proceedings in this Court. Its sole interest is as a non-party judgment creditor with respect to a portion of the punitive damages awarded to the respondent.

B. Petitioner Withheld Information From Physicians And The FDA In Knowing Violation Of Federal Regulations.

Oregon law prohibits punitive damages from being awarded against a pharmaceutical company unless the plaintiff proves, by clear and convincing evidence,

> "that the [company], either before or after making the drug available for public use, knowingly in violation of applicable Federal Food and Drug Administration regulations withheld from or misrepresented to the agency or prescribing physician information known to be material and relevant to the harm which the plaintiff allegedly suffered."

Or. Rev. Stat. § 30.927(2). There was clear and convincing evidence that petitioner knowingly violated several federal regulations.

1. The Food, Drug and Cosmetics Act prohibits distribution of a drug "if its labeling is false or misleading in any particular." 21 U.S.C. §§ 331(a) and 352(a).

Labeling includes not only the package insert, but also advertising and promotional materials. 21 CFR § 202.1 (*l*)(2); Tr. 1006. Labeling on or in the package must include a "Warnings" section which:

> ". . . shall describe serious adverse reactions and potential safety hazards, limitations in use imposed by them, and steps that should be taken if they occur. *The labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved.*"

21 CFR § 201.57(e) (emphasis added). Thus, if a pharmaceutical company obtains reasonable evidence of a serious hazard associated with an approved drug, the company must add or strengthen its warnings. Because of the FDA's paramount interest in public safety, neither proof of a causal relationship nor prior approval from the FDA is necessary. 21 CFR §§ 201.57(e), 314.70(b)(3) and 314.70(c)(2)(i); PX. 49; Tr. 1005-08.

Petitioner was aware of the medical literature that associated the risk of permanent vision loss with amiodarone. Tr. 1121-22, 1130-31, 1184. It conceded at trial that it did not warn American physicians of this risk in the package insert, promotional materials, "Dear Doctor" letters, or otherwise. Tr. 1033-34, 1208, 1210-11, 1587. Nor did petitioner caution American physicians to watch for early signs of vision loss or recommend regular eye examinations to patients taking the drug. PX. 3; Tr. 1204.

2. Even before the FDA authorized the marketing of amiodarone in the United States, petitioner knew of concerns that a risk of permanent vision loss might be associated with the drug. In 1984, the FDA Advisory Committee that recommended approval of amiodarone expressed concern about the lack of detailed, well-controlled clinical studies, the extraordinary risks associated with the

drug, and the prospect of "permanent loss of vision," which some members believed had not been adequately studied or researched. PX. 46 at 43, 58-64, 69, 81-82, 199-200, 230-33, 237-42. The Committee recommended FDA approval, but also recommended further research and study of the drug's risks. PX. 46 at 242, 244-45; Tr. 345-46. The FDA approved amiodarone for sale in the United States in late 1985, subject to the condition that petitioner "review regularly all published clinical literature on amiodarone, as well as any other data of interest, so that the labeling can be modified and updated as needed" and provide to the FDA "a review of new literature approximately quarterly with recommendations for labeling revision as needed." PX. 2; Tr. 346-49, 992-93, 1235.

Two federal regulations, 21 CFR §§ 314.80 and 314.81, also required petitioner to make certain reports to the FDA. Under 21 CFR §§ 314.80(b) and (c), petitioner was required to review reports in the scientific literature, as well as unpublished scientific papers, for references to adverse drug experiences involving amiodarone and to notify the FDA of those reports. A serious or unexpected adverse experience like vision loss that is not listed in the labeling needed to be reported to the FDA no later than 15 days after petitioner learned of it. 21 CFR §§ 314.80(a) and 314.80(c)(1)(I). A. 22a. In addition, 21 CFR § 314.81 required petitioner to submit to the FDA a comprehensive report each year within 60 days of the anniversary date of approval of petitioner's application to market amiodarone. The report was to include published clinical trials of the drug or abstracts of those trials, conducted by or otherwise obtained by petitioner.

Within a year after FDA approval, reports associating amiodarone use with vision loss began to appear in the medical literature. Petitioner knew of these reports as they were published. Tr. 1121-22, 1183-84. Between

1986 and 1993, at least ten articles appeared in the medical literature documenting or discussing the association between amiodarone and optic neuropathy or vision loss. PX. 16, 17, 18, 21, 22, 24, 25, 26, 27 and 28. Two of these—the Mayo Clinic and the Mansour articles—are especially important.[4] In violation of the terms of the FDA's approval and 21 CFR §§ 314.80 and 314.81, petitioner did not submit either article or otherwise report the information contained in them to the FDA. A. 22a, n. 13; PX. 2, 25; Tr. 361, 1012-13, 1217, 1409-10, 1415, 2012.

C. Petitioner Acted In Wanton Disregard For The Health, Safety And Welfare Of Persons In Oregon Who Use Amiodarone.

There was clear and convincing evidence that petitioner's conduct showed wanton disregard for the health, safety and welfare of amiodarone users in Oregon. In May 1988, petitioner proposed to modify its labeling for amiodarone to include "optic neuritis" as an adverse reaction occurring in less than one percent of patients. PX. 60. The FDA approved the change, but again reminded petitioner of its duty to report scientific literature to the FDA. PX. 61. Petitioner had not reported the

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[4] The first article, "Optic Neuropathy and Amiodarone Therpay," was published in 1987 in *Mayo Clinic Proceedings*. It described the results of a study of a number of patients undergoing amiodarone therapy at Mayo Clinic. PX. 18. Thirteen of the patients developed optic neuropathy, eight of whom suffered vision loss. The incidence of optic neuropathy was 1.79 percent, six times greater than the 0.3 percent incidence in an age-matched population. The authors found this sixfold increase to be significant and stated the loss of vision could be "severe and irreversible or recovery could be prolonged." They recommended amiodarone patients undergo thorough eye examinations, including periodic evaluation of the ocular fundus. PX. 18. The second article, by Dr. Mansour and others, was published a year later in the *Journal Of Clinical Neuro-Ophthalmology*. This was the only published report of extensive histopathologic studies of the toxic effect of amiodarone on the optic nerve. PX. 25.

Mayo Clinic or Mansour articles to the FDA, and the addition of "optic neuritis" as a possible adverse reaction did not inform cardiologists that permanent visual loss may occur. Tr. 971-72, 1033-34.

Petitioner has had the contractual right to market, distribute and promote amiodarone in Canada since September 1987, PX. 37, 38, 39, and its Canadian product is identical to its American product. PX. 4; Tr. 473. In September 1988, four months after petitioner added optic neuritis to the rare adverse reactions section of the American package insert, its Canadian subsidiary sent the Mayo Clinic article to the Canadian counterpart of the FDA with a request for approval to and a warning in the Canadian labeling for "some cases of visual impairment and decreased visual acuity in up to 2% of patients." PX. 5. The Canadian agency found the proposed warning inadequate "based on the submitted data," and required the following warning:

> ". . . Cases of optic neuropathy, usually resulting in visual impairment have been reported in patients treated with Cordarone. A causal relationship to the drug has not been clearly established. If such symptom appears, prompt ophthalmologic examination is recommended. Appearance of optic neuropathy calls for re-evaluation of Cordarone therapy. . . .
>
> "Regular ophthalmological examination, including fundoscopy and slit lamp examination, is recommended during administration of Cordarone."

PX. 6. It also required that optic neuropathy be added to the list of adverse ophthalmologic reactions, "in up to two percent of patients." *Id.* The Canadian labeling has contained these warnings since October 1988. PX. 7-15.

Petitioner was aware of this change in the Canadian labeling, but did not believe the American warning needed to be changed, based "on the experience . . . in our

country." Tr. 1185-86. That experience included the Mayo Clinic article that prompted the additional warnings in Canada but was withheld from the FDA.

By May, 1989, petitioner was in possession of a confidential memorandum from the European manufacturer of amiodarone which reviewed much of the literature on the association between amiodarone use and optic neuropathy and concluded:

> "These data thus require careful follow-up in the context of the pharmacovigilance organizations set up by the SANOFI Group at international level. For the moment and in view of the potential severity of the problems reported (possible progression to optic atrophy), it would seem ethical to complete the product information for physicians concerning the drug as suggested in the attached covering letter."

PX. 65. Petitioner did not produce the attached letter, so it was unavailable at trial. Tr. 1603.

In September, 1989, petitioner acknowledged that amiodarone may cause blindness in a letter to a physician who had lost his vision while taking amiodarone:

> "*Optic neuropathy occurs in less than 1% of the patients requiring Cordarone therapy and may result in blindness.* Since the marketing of Cordarone, there have been 22 cases of optic neuropathy reported, of which 15 were from literature sources and 7 were from spontaneous sources. Once again, the risk-benefit ratio of discontinuing Cordarone therapy must be considered."

PX. 66, 81 (emphasis supplied).

Then, the first in a series of events occurred which gave petitioner notice that understating the risks of amiodarone is a violation of federal law punishable by criminal and civil sanctions which include seizing the drug

and enjoining further sales. In December, 1989, the FDA accused petitioner of violating federal law by making false and misleading statements about certain hazards of the drug in its labeling, and it threatened to seek criminal sanctions and enjoin sales of the drug. PX. 68A. Although none of the hazards in question related to ocular side effects of amiodarone, there was evidence that this letter should have caused petitioner to evaluate its product labeling carefully to make sure it provided adequate warnings against all known hazards associated with the drug, including vision loss. Tr. 481-83, 486, 493-94, 1016-18. As one witness put it, the 1989 letter should have "put the fear of the Lord" into petitioner. Tr. 483.

An internal memorandum in June, 1990, documented petitioner's concern about possible Senate hearings on promotional practices used in the pharmaceutical industry. PX. 78. Following the hearings in December, 1990, Senator Kennedy issued a press release accusing petitioner of a poor record of compliance with FDA rules on promotion. PX. 69. There was evidence that a prudent and safety-conscious pharmaceutical company, upon learning of Senator Kennedy's remarks, would have re-examined its labeling for amiodarone to determine whether it contained adequate warnings of all serious hazards known to be associated with its use. Tr. 493-94, 1028. Petitioner acknowledged at trial that Senator Kennedy's remarks and the Senate hearings should have spurred it to look carefully at whether the risks of the drug were being understated. Tr. 1583-84.

In July, 1991, petitioner acknowledged that optic neuritis and optic neuropathy are different conditions and that only the former is included in the labeling for amiodarone in the United States. PX. 62. In a memorandum to the European manufacturer of amiodarone, it described the difference between the two conditions as "significant":

> "Since neuritis denotes an inflammation of the optic nerve and neuropathy refers to the degeneration of the optic nerve, our medical monitors deemed the difference between these two conditions to be significant. . . ."

PX. 62; Tr. 1238-39. This admission makes a mockery of petitioner's contention below, renewed here, Pet. at 4, that the warning against optic neuritis was sufficient compliance with federal labeling regulations to immunize it from liability for punitive damages because the terms "optic neuritis" and "optic neuropathy" are different names for the same condition that can be used interchangeably. See A. 27a-28a.

In February, 1992, the FDA again accused petitioner of violating federal law by selective listing of side effects and minimizing other risks of amiodarone in promotional pieces. PX. 70. This letter should also have caused petitioner to look carefully at its labeling to verify it was adequately informing physicians and patients of the risks known to be associated with the drug. Tr. 1029.

By October, 1992, petitioner knew enough about the loss of vision associated with amiodarone to know it was usually "progressive." A physician employed by petitioner wrote:

> "[A Canadian physician] reported that one of her patients, a female, became blind in the left eye during the use of Cordarone 400 mg daily (five days per week). The appearance of blindness was rather sudden and not *progressive like usually seen with amiodarone.* She also became blind in the right eye within the following week."

PX. 67, 81; Tr. 1200 (emphasis supplied).

Respondent began amiodarone in August, 1994. PX. 1; Tr. 695. In addition to the medical literature document-

ing an association between the drug and the risk of vision loss, by 1994 petitioner had received 27 spontaneous adverse drug experience reports of amiodarone patients experiencing visual loss or optic nerve injury. PX. 81, 82. Between that time and trial, petitioner received 21 more such reports. PX. 83, and still did not warn of the risk. Tr. 1212.

The Court of Appeals of Oregon concluded that the evidence permitted the jury to find, by clear and convincing evidence,

> "that [petitioner] knew of the association between amiodarone use and optic neuropathy; that optic neuritis and optic neuropathy were not interchangeable diagnoses; that optic neuropathy could cause permanent vision loss; and that [petitioner] made a conscious choice not to warn of optic neuropathy."

A. 28a. The evidence also permitted the jury to find that petitioner's choice not to warn was motivated, at least in part, "by financial concerns related to its ability to market the product." *Id.* Under Oregon law, wanton disregard for the health, safety or welfare of others may be shown by evidence that a person acted with extraordinary disregard of or indifference to known or highly probable risks of harm to others. *Andor v. United Air Lines, Inc.*, 303 Or. 505, 517, 739 P.2d 18, 26 (1987). The court of appeals concluded that the evidence permitted the jury to find that petitioner's conduct exhibited such extraordinary disregard or indifference to warrant an award of punitive damages. A. 28a-29a. These conclusions rest solely on the application of Oregon law, and petitioner does not challenge them here.

Petitioner's assertion that there was no peer-reviewed scientific evidence that amiodarone can cause vision loss is untimely, misleading and irrelevant. Pet. at 3-4, 17. It is untimely because petitioner did not contend at trial

that there was insufficient evidence that amiodarone can cause vision loss to support the verdict.[5] It is misleading because, although causation was contested at trial, petitioner did not object to expert opinion testimony that amiodarone can cause permanent vision loss, Tr. 977, 1962-64, 1965-67, and in fact did cause respondent's blindness. Tr. 616-17, 644-45. It is also irrelevant because petitioner had known that vision loss was a risk associated with amiodarone at least seven years before the drug was prescribed for respondent, and reasonable evidence of an association between amiodarone and vision loss triggers the duty to warn, 21 CFR § 201.57(e), no matter what petitioner may have subjectively believed about the presence or absence of a causal link between amiodarone and vision loss.

Petitioner notes there was no evidence the FDA objected to the label's warning on optical side effects or asked that it be changed. Pet. at 8, 17. There was no need for such evidence. Aside from the fact that petitioner withheld information from the FDA about adverse ocular reactions associated with amiodarone, its duty to warn did not depend upon a request or approval from the FDA. Petitioner was required to warn against a serious adverse side effect of amiodarone as soon as it had reasonable evidence of its association with the drug. 21 CFR §§ 201.57(e), 314.70(b)(3) and 314.70(c)(2)(i).

REASONS FOR DENYING THE PETITION

Petitioner presents two issues. First, it argues that the mere existence of a state law permitting Oregon to share

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[5] Petitioner complains that the court of appeals declined to address the question of whether there was sufficient evidence to show that it knew or should have known amiodarone could cause optic neuropathy resulting in vision loss. Pet. at 17. The court of appeals could not consider this issue under Oregon's procedural rules, see *Vancil v. Poulson*, 236 Or. 314, 320-21, 388 P.2d 444, 448 (1964), because petitioner did not present it to the trial court. A. 27a.

in the recovery of punitive damages triggers the Eighth Amendment's prohibition against excessive fines and that this prohibition in the punitive damages context is stricter than the limits on punitive damages imposed by the Due Process Clause. This issue is hopelessly premature, does not warrant review by this Court, and is not well-presented in this case. Second, petitioner asserts that the trial court violated the Constitution by failing to make express findings concerning the propriety of the punitive damages award in this case. There is no substantial constitutional defect in the trial court's process, and the issue plainly does not warrant review by this Court.

I. THE PRESENT CASE IS NOT AN APPROPRIATE VEHICLE TO CONSIDER THE APPLICATION OF THE EXCESSIVE FINES CLAUSE TO AN AWARD OF PUNITIVE DAMAGES TO A PRIVATE PARTY.

A. Oregon's Split-Recovery Statute Has Been Declared Unconstitutional.

On July 7, 1999, while petitioner's petition for review of the court of appeals' decision was pending in the Supreme Court of Oregon, an Oregon trial court ruled that Or. Rev. Stat. § 18.540 violates the takings clause, article I, section 18, of the Constitution of Oregon. *Bocci v. State of Oregon*, Multnomah County Circuit Court case no. 9806-04765. See respondent's appendix (RA), 1a. The plaintiff in *Bocci* argued that Or. Rev. Stat. § 18.540 violates several provisions of the state and federal constitutions. The trial court addressed only the state takings claim. It ruled that a verdict awarding punitive damages to a party establishes a constitutionally protected property interest in the award with which the State may not interfere without just compensation.

> "The effect of Or. Rev. Stat. § 18.540 is solely to reallocate what would have been the plaintiff's, based on the verdict of the jury, and make it the property of the State. . . .

> "There is no dispute that but for the operation of Or. Rev. Stat. § 18.540, plaintiff would receive the entire punitive damage award. Consequently, the funds at issue are the plaintiff's property, taken by the State without just compensation."

RA. 6a, 7a. The State of Oregon appealed, and the matter is currently pending before the Court of Appeals of Oregon, case no. CA A107736. Until the issues in that case are resolved, the government's right to a share of punitive damages awarded to respondent is uncertain at best.

If the ruling in *Bocci* is affirmed on appeal, Oregon's Criminal Injuries Compensation Account will have no right to share in punitive damages awarded to a private party in a civil action. In that event, the excessive fines issue petitioner asks the Court to review will be moot. As the Court held in *Browning-Ferris,* the Excessive Fines Clause would not apply to the punitive damages awarded here because the government neither prosecuted the action nor would be entitled to a share of respondent's recovery. On the other hand, if the trial court's ruling in *Bocci* is reversed on appeal, the case will be remanded for consideration of the plaintiff's remaining state and federal constitutional contentions. In that event, it may be several years before the Criminal Injuries Compensation Account's right to a share of punitive damages awards in civil actions is settled. In the face of such fundamental and continuing uncertainty about the validity of Or. Rev. Stat. § 18.540 and of the government's right to share in the punitive damages awarded to a private party, the question of whether the Excessive Fines Clause applies to the punitive damages awarded to respondent is not ripe for review.

B. The Excessive Fines Issue Is Not Timely

Petitioner's claim that the punitive damages awarded to respondent is an excessive fine is not timely until the

State of Oregon is a party to litigation in which it can be addressed. Contrary to the posture of the litigation below, petitioner adds the State of Oregon as the first-named respondent, thereby implicitly acknowledging the deficiencies in this case as a vehicle for deciding whether the award even remotely implicates a serious Eighth Amendment issue. Oregon was dismissed from the action prior to judgment and was not a party to the appeal in the state courts. Hence, the State of Oregon is not a respondent in this Court, and its absence undermines any effort to decide the Eighth Amendment issue. Respondent has not violated the Eighth Amendment and there will be no excessive fines issue if he is allowed to keep the entire award.

If the State of Oregon acquires a share of the punitive damages awarded to respondent, petitioner may then assert any Eighth Amendment argument it has directly against the State. Litigation in that context can address whether the Excessive Fines Clause has been incorporated in the Due Process Clause of the Fourteenth Amendment, whether the Eighth Amendment applies to corporations, and whether the standards of excessiveness under the Eighth Amendment differ from those under the Due Process Clause. All of those questions must be answered before an Eighth Amendment violation can be declared with respect to the punitive damages award in this case. None of them, however, was briefed, argued or decided in the lower courts, and the State of Oregon has not been heard on any of them. With those issues still awaiting development, it makes no sense for this Court to intervene at this time.

Moreover, if the Court grants certiorari and any part of the award is invalidated as an excessive fine, respondent would suffer an injustice if the unconstitutionality of the Criminal Injuries Compensation Account's interest in punitive damages awards is eventually affirmed in *Bocci*.

In that event, the Criminal Injuries Compensation Account would not have a right to share in any punitive damages awarded to a private person in a civil action, the Eighth Amendment would be inapplicable after all, and respondent would be entitled to the full amount of punitive damages awarded to him.[6]

C. The Court of Appeals' Decision Adheres To The Rationale And Substance of *Browning-Ferris*.

Petitioner asserts that "Oregon has effectively overruled the substance of *Browning-Ferris*." Pet. at 11-12. Not so. The Court of Appeals of Oregon in this case adhered to its earlier decision in *Tenold v. Weyerhaeuser Co.*, 127 Or. App. 511, 873 P.2d 413 (1994) (en banc), *review dismissed upon settlement of case*, 321 Or. 561, 901 P.2d 859 (1995), and *Tenold* faithfully followed *Browning-Ferris*.

In *Tenold*, the court of appeals reviewed *Browning-Ferris*'s teachings about the history and purpose of the Eighth Amendment. It noted this Court's statements, 492 U.S. at 266, 268, that the Framers were concerned with "the potential for governmental abuse of its 'prosecutorial' power" and that the Excessive Fines Clause was "intended to limit only those fines *directly imposed by*, and payable to, the government." *Tenold*, 127 Or. App. at 528, 873 P.2d at 423 (emphasis added by the court of appeals). It quoted the following statement from *Browning-Ferris*:

> " '[This Court] has never held, or even intimated, that the Eighth Amendment serves as a check on the power of a jury to award damages in a civil case.

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[6] Respondent will file an action challenging the Criminal Injuries Compensation Account's right to share in punitive damages once there is a recovery on the judgment and the issue becomes ripe for adjudication. That action, like *Bocci*, will give the parties in interest an opportunity to raise these issues and the Oregon courts an opportunity to rule on them. The Court may be asked to address one or more of those issues in that case in a few years from now.

> Rather, our concerns in applying the Eighth Amendment have been with the criminal process and with *direct actions initiated by government* to inflict punishment. Awards of punitive damages do not implicate these concerns.' 492 U.S. at 259, 109 S. Ct. at 2912."

Tenold, 127 Or. App. at 528, 873 P.2d at 423 (emphasis added by the court of appeals). The court of appeals stated that even though Or. Rev. Stat. § 18.540 makes the government a "beneficiary" of a portion of a punitive damages award after a verdict has been entered, a private party, not the government, sued the defendants, and the jury awarded punitive damages to punish and deter them from engaging in future misconduct. Concluding that the purposes of the Eighth Amendment would not be furthered if applied under such circumstances, the court of appeals declined to hold that the punitive damages award in *Tenold* was subject to the Excessive Fines Clause. *Id.* at 528-29, 873 P.2d at 423-424. That conclusion, far from rejecting the rationale of *Browning-Ferris*, is rooted in it.

Petitioner's argument to the contrary rests on a distorted reading of *Browning-Ferris*. Petitioner asserts that the Court held that the Excessive Fines Clause "does not apply to punitive damages that are awarded *entirely* to a private party." Pet. at 8-9 (emphasis added). That, however, is not what the Court held. The Court expressed its holding in the following language:

> "Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government *neither* has prosecuted the action *nor* has any right to receive a share of the damages awarded."

492 U.S. at 264 (emphasis added). The precise holding of *Browning-Ferris* is that the Excessive Fines Clause does

not apply to an award of punitive damages in a civil action where the government does not prosecute the action and does not share in the damages awarded.

Petitioner asks the Court to focus on Oregon's right to receive a share of the punitive damages awarded to respondent and to ignore the fact that, as in *Browning-Ferris*, a private party rather than the government prosecuted the action. Selectively quoting from *Browning-Ferris*, 492 U.S. at 272, petitioner asserts that the Court "explicitly restricted its Eighth Amendment holding to cases in which 'the government has no share in the recovery'." Pet. at 9. Once again, that is not what the Court said. At the cited page, the Court rejected the argument that the amercements clause of the Magna Carta, which limited abuses of power by King John, is a basis for concluding that the Excessive Fines Clause limits the ability of a civil jury to award punitive damages. The concerns addressed by the amercements clause, the Court stated,

> "are clearly inapposite in a case *where a private party receives exemplary damages from another party*, and the government has no share in the recovery."

492 U.S. at 272 (emphasis added). The emphasized language underscores the holding of *Browning-Ferris*: the Excessive Fines Clause does not apply to an award of punitive damages in a civil action if a private party rather than the government seeks punitive damages and the government has no share in their recovery.

The Court in *Browning-Ferris* did not address the question of whether the Excessive Fines Clause applies to a punitive damages award in a civil action if a private party seeks punitive damages and the government *is* entitled to share in their recovery. Neither the holding nor the rationale of *Browning-Ferris* warrants the inference that the

Excessive Fines Clause applies in those circumstances, however. In fact, the rationale of *Browning-Ferris* supports the opposite conclusion.

The test of whether a sanction is subject to the Excessive Fines Clause is whether it is "a payment to a sovereign as punishment for some offense." *Browning-Ferris*, 492 U.S. at 265. When the Eighth Amendment was adopted and ratified, the term "offense" meant "offense against the King." *Id.* at 265, n. 6. Because petitioner was not charged with or found guilty of an offense, the Criminal Injuries Compensation Account's share of the punitive damages awarded to respondent is not a payment to the government as punishment for an offense. Hence, it is not a fine within the meaning of the Eighth Amendment. Moreover, the Framers intended the Excessive Fines Clause to limit "the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends," *Browning-Ferris*, 492 U.S. at 267, not the power of a properly instructed jury to award punitive damages as permitted by state law to a private party in a civil action. Where the government does not sue to exact payment as punishment for some offense, it is not using its prosecutorial power. Therefore, no abuse of government prosecutorial power was even possible in this case.

The Court relied upon "precisely the lack of this incentive for abuse in holding that 'punitive damages' were not 'fines' within the meaning of the Eighth Amendment" in *Browning-Ferris*. *Harmelin v. Michigan*, 501 U.S. 957, 979, n. 9 (1991) (opinion of Scalia, J.). In accordance with Oregon law, *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 211, 797 P.2d 1019, 1021 (1990), the jury in this case was not told that any punitive damages it might award would be apportioned. The jury awarded damages to respondent, not the government. The prospect, unknown to the jury, that the Criminal Injuries Compen-

sation Account might receive a share of the punitive damages award neither invites, nor is an instance of, the abuse of governmental power that the Excessive Fines Clause was intended to constrain. Under the rationale of *Browning-Ferris*, the government's right as a non-party judgment creditor to a statutory percentage of respondent's punitive damages award is insufficient to subject the award to the Excessive Fines Clause.

D. This Court's Forfeiture Decisions Since *Browning-Ferris* Are Inapposite.

Petitioner's assertion that the court of appeals' decision violates this Court's Eighth Amendment rulings after *Browning-Ferris* is also mistaken. In *Alexander v. United States*, 509 U.S. 544, 558-59 (1993), the Court held that an *in personam* criminal forfeiture of businesses used in the commission of racketeering offenses and profits from racketeering activities was a fine within the meaning of the Excessive Fines Clause. Similarly, *United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998), held that an *in personam* criminal forfeiture of currency being carried out of the country was subject to the Excessive Fines Clause because it was punishment for the offense of willful failure to report removal of more than $10,000 from the United States. In *Austin v. United States*, 509 U.S. 602, 620-22 (1993), the Court held that an *in rem* civil forfeiture under 21 U.S.C. §§ 881(a)(4) and (a)(7) of a mobile home and auto body shop used in the commission of a drug offense constituted "payment to a sovereign as punishment for some offense" and was therefore subject to the Excessive Fines Clause.

These cases are inapposite. In each of them, the government commenced a criminal or civil action seeking forfeiture of the instrumentalities or proceeds of criminal activity. Here, a private party, not the government, commenced a civil action to recover damages for physical injury, and punitive damages were not imposed as punish-

ment for an offense, but as punishment under the common law of Oregon for failure to warn of a known risk of serious bodily harm in wanton disregard for the safety and health of respondent and other users of amiodarone in Oregon. What was said of the government of Vermont in *Browning-Ferris* applies equally here:

> "Here the government . . . has not taken a positive step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or disabling some individual."

492 U.S. at 275. Other than obtaining a dismissal of the claims and cross-appeal against it, the State of Oregon has not used the civil courts in this case at all.

E. The Decision Below Does Not Conflict With Decisions Of Other Jurisdictions

Petitioner cites three decisions by state courts and three federal decisions in support of its contention that the decision of the court of appeals conflicts with decisions of other jurisdictions. However, none of those decisions held that the Excessive Fines Clause applies to an award of punitive damages in a civil action between private litigants where the government has a right to share in the award. There is, therefore, no split among lower courts on the question presented.

The Supreme Court of Georgia in *Mack Trucks, Inc. v. Conkle*, 263 Ga. 539, 545, 436 S.E.2d 635, 640 (1993), did not address the threshold question of whether the Eighth Amendment applies to punitive damages awards shared with the government. Without discussion or an express holding, the court simply assumed that it did, and ruled that a punitive damages award shared with the State under Georgia's split-recovery statute did not violate the Eighth Amendment.

In *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), the district court did not hold the Excessive Fines Clause applies to an award of punitive damages in a civil case between private litigants. It held instead that Ga. Code Ann. § 51-12-5.(1)(e)(2), which makes the State of Georgia a non-party judgment creditor entitled to 75% of any award of punitive damages in a product liability action, is unconstitutional because, among other reasons, it violates the excessive fines clauses of the state and federal constitutions. *McBride*, 737 F. Supp. at 1579. This conclusion, if applied to Or. Rev. Stat. § 18.540, would invalidate Oregon's split-recovery statute, thereby undercutting petitioner's argument in this Court.

Far from conflicting with the decision below, the decision in *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994), bolsters it. As applied in *Spaur*, Iowa's split-recovery statute required the defendant to pay approximately 75% of the punitive damages award after costs and fees to a civil reparations trust fund administered by the state court administrator. The court rejected the defendant's contention that because the trust fund is controlled and supervised by the state's executive counsel there is sufficient government sharing in the award to transform the plaintiff's product liability action into a government prosecution, thereby triggering the protections of the Excessive Fines Clause. The court noted that the trust fund is distinct from the general state treasury and that damage awards are not commingled with state revenues but are used only to support indigent civil litigation or insurance assistance programs. 510 N.W.2d at 868-69. Quoting *Browning-Ferris*, 492 U.S. at 275 ("The fact that punitive damages are imposed through the aegis of the courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take"), the court did not "find that the limited nature of the State's interest in a share of any punitive damage award

transforms [the split-recovery statute] into either a criminal or quasi-criminal statute." *Id.* at 869. Although the Eighth Circuit Court of Appeals expressed concern whether Iowa's split-recovery statute "may implicate . . . constitutional issues of due process and excessive fines," *Burke v. Deere & Co.* 6 F.3d 497, 512, n. 26 (8th Cir. 1993), it did not reach those issues in *Burke*.

The defendant in *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. 1999) (en banc), did not contend that punitive damages awarded against it constituted an excessive fine. Rather, it challenged the constitutionality of Missouri's split-recovery statute, contending the statute violated the Excessive Fines or the Takings Clauses. *Id.* at 53. The Supreme Court of Missouri held that defendant's constitutional contentions gave it jurisdiction of defendant's appeal, but reversed the judgment on state law grounds without addressing the constitutional issues. *Ibid.*

The decision of the Court of Appeals of Oregon does not conflict with any of the foregoing decisions. Nor does it conflict with district court decisions applying the Excessive Fines Clauses to awards of punitive damages in *qui tam* actions under the False Claims Act. In *qui tam* actions, the government, or a private person on the government's behalf, brings suit against another to collect a civil penalty between $5,000 and $10,000 and up to three times the damages sustained by the United States as a result of fraud against the government. 31 U.S.C. § 3730. The action must be brought in the name of the government. 31 U.S.C. § 3730(b)(1). The government has the right to take over the action from the *qui tam* plaintiff and prosecute the action itself. 31 U.S.C. § 3730(b)(4). Whether the action is conducted by the *qui tam* plaintiff or by the government, any recovery is payable to the government except for an amount, limited by statute, that may be awarded to the *qui tam* plaintiff as reasonable

compensation for collecting the civil penalty and damages. 31 U.S.C. § 3730(d)(1) and (d)(2). *Qui tam* actions are thus prosecutions by or in the name of the government to collect civil penalties payable to the government, with the *qui tam* plaintiff receiving a share of the recovery. Those features are not present here. The fact that some district courts have applied the Excessive Fines Clause to False Claims Act penalties is therefore no basis for concluding that it applies to the punitive damages awarded to respondent and certainly no reason for this Court to grant review here.

II. THE TRIAL COURT'S FAILURE TO EXPLAIN ITS AFFIRMANCE OF THE PUNITIVE DAMAGES AWARD DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. Petitioner Forfeited Any Right It May Have Had To An Explanation Of The Trial Court's Ruling.

No one doubts the value of having a trial court explain the basis for a ruling on the record. Not only does this practice enable the parties to understand the reasons for the ruling, it facilitates appellate review. Assuming *arguendo* that the Due Process Clause gave petitioner the right to a statement of reasons on the record, that right can be forfeited. *Yakus v. United States*, 321 U.S. 414, 444-45 (1944) ("a constitutional right may be forfeited in . . . civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it"); *Interstate Busses Corp. v. Holyoke St. Ry. Co.*, 273 U.S. 45, 52 (1927) (bus company, having failed to apply for a license required by state law, lacked standing to attack the law as violating due process). In this case, it was.

When petitioner moved for a new trial on the ground that punitive damages were excessive, it requested that the proceedings be reported. At no time, however, did it request that the trial court articulate reasons for its rulings.

Having moved for review of the verdict under *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), Pet. at 5, petitioner was aware of the significance of having a statement of reasons on the record, yet it failed to request one. It thereby forfeited whatever right it had to an explanation of the trial court's ruling.

B. The Trial Court's Failure To State Reasons For Its Ruling On Petitioner's Challenge To The Size Of The Punitive Damages Award Is Not A Constitutional Violation.

Petitioner's argument that the trial court did not provide the post-verdict review of punitive damages required by the Due Process Clause relies solely on the fact that its motions for judgment notwithstanding the verdict or for a new trial were denied by the trial court without explanation. Citing *Haslip*, and *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), it contends it had a constitutional right to a statement of reasons from the trial court. Pet. at 9-10. Those cases do not support that contention.

In *Haslip*, the Court held that procedural protections provided by Alabama common law to ensure the reasonableness of punitive damages awards did not violate due process.[7] 499 U.S. at 23. In *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986), the Supreme Court of Alabama established one such protection when it required trial courts "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." However, the Supreme Court of Alabama did not hold that due process *requires* such an explanation. Neither did this Court do so in *Haslip*. Because the trial court in *Haslip* had in fact explained its ruling on the record, 499 U.S. at 23, the issue was not presented.

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[7] The Court did not find that the protections provided by Alabama law were necessary to comply with due process, but merely sufficient. *Morgan v. Woessner*, 997 F.2d 1244, 1256 (9th Cir. 1993).

When the issue was presented, a plurality of the Court declined to hold that a trial court's failure to explain its denial of a motion to reduce or eliminate a punitive damages award challenged as excessive was a constitutional violation. *TXO*, 509 U.S. at 465 (1993). Because *TXO* has already resolved the issue on which petitioner seeks review, the trial court's failure to state its reasons in this case does not present a substantial federal question.

Petitioner attempts to marginalize the ruling in *TXO*. It states that the plurality pointed out the trial judge "had orally *explained* his agreement with the jury's appraisal of the conduct." Pet. at 21 (emphasis added). That, however, is not what the plurality said. Justice Stevens noted that, although the trial judge did not articulate his reasons for upholding the award, he "did give counsel an *adequate hearing* on TXO's post-verdict motions, and during one colloquy *indicated his agreement* with the jury's appraisal of the egregious character of the conduct of TXO's executives." 509 U.S. at 465 (emphasis added). Two conclusions follow from this statement. First, an indication of agreement with the jury's assessment of the defendant's conduct is *not* an articulation of reasons for denying the motion. If it were, the question of whether the trial judge's failure to explain his ruling was a constitutional violation would not have arisen. Second, the failure to articulate reasons does not, as petitioner contends, render a hearing "inadequate." If it did, the post-verdict hearing afforded counsel in *TXO* would have been inadequate for that reason alone. Yet, the plurality characterized the hearing on TXO's motions as adequate, notwithstanding the fact that the trial judge did not explain the basis of his ruling.

The reminder in *Oberg*, 512 U.S. at 420, of *Haslip's* emphasis on the need for meaningful and adequate review by a trial court is not to the contrary. The issue decided in *Oberg* was "whether the Due Process Clause

requires judicial review of the amount of punitive damages awards," 512 U.S. at 420, not whether the Due Process Clause requires a reviewing court to articulate the reasons for its decision on the record. The latter issue was not discussed in *Oberg*.

Petitioner asserts that the Court of Appeals of Oregon ruled "that inadequate review by the trial court did not matter." Pet. at 19. That is a gross distortion of the court's ruling. What the court of appeals stated is that "because the constitutional issue is purely a legal issue, the trial court's reasoning in support of its decision, while helpful, has no direct bearing on our review." A. 35a. That statement is a simple application of Oregon's rule that an appellate court is not bound by the trial court's legal conclusions, *State v. Jacobus*, 318 Or. 234, 240, 864 P.2d 861, 864 (1993), which are reviewed for errors of law. *State v. Ehly*, 317 Or. 66, 75, 854 P.2d 421, 427 (1993).[8]

Petitioner similarly distorts the significance of a statement made by the Supreme Court of Oregon in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8 (1995), *cert. denied*, 517 U.S. 1219 (1996), after remand from this Court. After defining the standard of review to be applied in post-verdict and appellate review of the size of punitive damages awards, the court turned to the question of whether the case should be remanded to the trial court to apply the new standard in the first instance. It decided not to remand, for three reasons.

> "First, on remand from the Supreme Court of the United States, this court has resolved questions of law and has determined how Oregon law will com-

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[8] The court of appeals in fact conducted a thorough, independent review of the punitive damages awarded to determine whether the amount of the award violated petitioner's right to substantive due process. A. 35a-42a. The court concluded that the award was not excessive under *BMW*, and petitioner does not challenge that ruling here.

> port with the requirements newly articulated by the Supreme Court. *We are in as good a position as would be the trial court to apply a legal standard to the evidence in the record.* Second, by applying that new standard to the facts in this case, we may be able to give some guidance to trial courts that will need to follow this standard in the future. Third, the judgment was entered more than five years ago; we see no reason to delay resolution of this case any longer."

320 Or. at 551-552, 888 P.2d at 12 (emphasis added). Oregon's appellate courts have never asserted that trial court review of a punitive damages award does not matter.

Finally, petitioner cites five failure-to-state-reasons cases in support of its claim that the decision in this case conflicts with holdings of other federal and state courts. Pet. at 22. All but one of the cited cases were decided before *TXO*, and none held that the Due Process Clause requires a trial court to explain its decision on the record where such an explanation was not requested.

In *American Employers Ins. v. Southern Seedling Serv.*, 931 F.2d 1453 (11th Cir. 1991), and *Robertson Oil Co. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), federal district courts, applying Alabama and Arkansas law, respectively, made summary rulings on excessiveness challenges to a punitive damages award. The cases were remanded with instructions to the district courts to place the reasons for their rulings on the record. Remand was not based on the ground that due process had been violated, but on the ground that the appellate courts were unable to tell whether the district court had reviewed the punitive damages award under state common law standards and principles. *American Employers*, 911 F.2d at 1464; *Robertson Oil Co.*, 930 F.2d at 1347.

In *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and *Gamble v. Stevenson*, 305

S.C. 104, 406 S.E.2d 350 (1991), the Supreme Courts of West Virginia and South Carolina, in response to *Haslip,* announced new common law procedures to guide juries and trial courts in awarding and reviewing, respectively, punitive damages. In each case, trial courts were required to explain the bases for their rulings on the record. Neither case held that this requirement was a matter of due process, however. The South Carolina Supreme Court specifically noted that while *Haslip* sustained Alabama's method for awarding punitive damages,

> "The Court . . . did not hold that each and every procedural protection furnished to Alabama defendants need be afforded to all defendants in all cases throughout the land. In our opinion, and as noted by *Haslip* itself, it is sufficient that the protections meet 'general concerns of reasonableness' and are followed by 'adequate guidance' from the trial court."

Gamble, 305 S.C. at 110, 406 S.E.2d at 354.

Finally, in *Coffey v. Fayette Tubular Products,* 929 S.W. 2d 326, 328 (Tenn. 1996), decided after *TXO,* the Supreme Court of Tennessee followed its earlier decision in *Hodges v. S.C. Toof & Co.,* 833 S.W. 2d 896 (Tenn. 1992), in which it had required, again as a matter of state law, trial courts conducting post-verdict reviews of punitive damage awards to set forth specific reasons for their rulings.

Unlike other states, Oregon does not expressly require its trial courts to provide such explanations. In sum, the fact that the trial court in this case failed to provide an unrequested explanation does not give rise to a substantial federal question and does not warrant further review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN PAUL GRAFF
GRAFF & O'NEIL
2121 S.W. Broadway, Suite 100
Portland, Oregon 97201
(503) 222-4545

JEFFREY B. WIHTOL *
JEFFREY B. WIHTOL, ESQ.
2121 S.W. Broadway, Suite 100
Portland, Oregon 97201
(503) 228-1210
Attorneys for Respondent

* Counsel of Record

December 21, 1999

APPENDIX

APPENDIX

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IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Case No. 9806-04765

PAUL R. BOCCI, JR., guardian ad litem
for PAUL R. BOCCI, III, an incapacitated individual,
Plaintiff,

v.

STATE OF OREGON,
Defendant.

OPINION AND ORDER

INTRODUCTION

This matter comes before the court on plaintiff's and defendant's cross-motions for summary judgment. The pleadings raise purely legal issues and each party asserts it is entitled to judgment as a matter of law on each of plaintiff's claims.

The court determines that plaintiff is correct in his assertion that ORS 18.540 operates as a "taking" without just compensation, in violation of the Oregon Constitution, Article I, section 18. In light of this ruling, the court declines to reach the other grounds on which plaintiff asserts the punitive damages allocation statute is invalid.

BACKGROUND

In the underlying personal injury case, Multnomah County Circuit Court case number 9210-07050, plaintiff sued Key Pharmaceuticals, Inc., and others, for both compensatory and punitive damages. The jury returned a verdict finding defendants at fault (and plaintiff comparatively negligent) and determined that plaintiff's economic damages were $1,605,805, that his non-economic damages were $7,427,500. The jury also made the findings necessary to support an award of punitive damages and answered "What are the Plaintiff Paul R. Bocci, III's punitive damages?" with "35 million."

When it entered judgment, the trial court reduced plaintiff's economic and non-economic damages by his percentage of fault, reduced his compensatory damages by $250,000 (the amount of prior settlements) pursuant to ORS 18.455, and made the State of Oregon a judgment creditor "in an amount equal to one-half of the punitive damages awarded to Plaintiff after payment of attorney fees," pursuant to ORS 18.540.

The underlying case was settled while an appeal was pending, and the funds were placed in trust. The settlement was approved by the State of Oregon. The compensatory damages and 50% of the punitive damages have been released to plaintiff. The only dispute remaining is as to the other 50% of the punitive damages and the validity of ORS 18.540. That statute purports to allocate a portion of punitive damage awards to the Criminal Injuries Compensation Account.

Plaintiff brought this action against the State of Oregon seeking a declaration that ORS 18.540 is unconstitutional on an[y] number of grounds, and that he is entitled to the remaining 50% of the punitive damages.

This court was much assisted by the thorough briefing and clarifying arguments of counsel.

ANALYSIS

State "Takings" Claim

This court is mindful of the strong presumption that statutes are constitutional. Plaintiff has a heavy burden to clearly show the unconstitutionality of the statute to reach the outcome he seeks in this case. Nevertheless, it is the duty of the court to uphold the constitution as the supreme law of the land, and to protect the public if the legislature has overreached its constitutional bounds. This is the fundamental role of the judiciary in acting as a check upon and a balance against the other, co-equal, branches of government.

The 1993 [sic] version of the punitive damages allocation law, ORS 18.540, governed the underlying case. That statute provided:

> (1) Upon the entry of a judgment including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (c) of this subsection, and the punitive damage portion of the award shall be allocated as follows:
>
> > (a) The attorney for the prevailing party shall be paid the amount agreed upon between the attorney and the prevailing party.
> >
> > (b) One-half of the remainder shall be paid to the prevailing party.
> >
> > (c) One-half of the remainder shall be paid to the Criminal Injuries Compensation Account to

> be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

Oregon Constitution, Article I, Section 18, provides in pertinent part:

> Private property shall not be taken for public use . . . without just compensation[.]

Plaintiff contends that ORS 18.540 operates to "take" a portion of his award of punitive damages without compensation.

Defendants [sic] contends that nothing has been taken *from plaintiff*, because plaintiff had no cognizable, protectable property right to punitive damages. According to defendant, plaintiff has no vested right in the amount of punitive damages that may be awarded, and the legislature may limit or condition the recovery of punitive damages without impairing constitutional rights. Furthermore, the State contends that because the allocation statute was in existence before the plaintiff brought his claim, he could never have acquired an interest in or right to more than a 50% interest in whatever judgment was entered for punitive damages.

The contention that plaintiff could never have a property interest in more than 50% of the punitive damages because the allocation statute existed when he brought his claim is resolved by reference to *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998).

In *Webb's*, the Supreme Court held analyzed a state statute pursuant to which a county, in addition to a fee charged for services, took as its own the interest accruing on an interpleader fund deposited in the registry of the county court. The Court concluded that the statute caused an unconstitutional taking. The Florida Supreme Court had upheld the statute on the theory that the funds were public funds during the time they were held by the court, that the statute took only what it created, and the interest earned was not private property. The United States Supreme Court rejected this reasoning, characterizing it as *ipse dixit*.

In *Phillips* the respondents challenged a Texas Interest on Lawyers Trust Account (IOLTA) program, under which the interest earned on client funds deposited in lawyers' trust accounts was paid to foundations that finance legal services for low-income individuals. The issue before the Supreme Court was whether the interest was "private property" of either the attorney or client for purposes of the Takings Clause of the Fifth Amendment to the United States Constitution. Petitioners argued that respondents had no protectable right in the interest because, under Texas law, interest follows principal only if the interest is allowed by law or fixed by the parties. The Supreme Court rejected this reasoning, noting that interest on lawyer trust accounts *was allowed by Texas law*. The dispute concerned who owned the interest that was *actually earned*.

Defendant seeks to distinguish the *Webb's* and *Phillips* decisions on the grounds that they concern interest and the deeply-rooted notion of property rights that "interest follows principal." Punitive damages, the State argues, do not have the same relationship to compensatory damages as interest does to principal. The court agrees that there are significant differences. The distinction does not help

the State, however, where the issue is an attempt to change ownership rights that may arise in the future by legislative declaration.

Whether the legislature has the authority to cap or completely eliminate punitive damages as the State contends is debatable. The parties agree that punitive damages in Oregon are a creature of the common law. Oregon Constitution, Article VII (Amended) section 3. *See Lakin v. Senco Products, Inc.*, 144 Or. App. 52, 925 P.2d 107 (1996), *rev. allowed* 325 Or. 438 (1997); *Tenold v. Weyerhaeuser Co.*, 127 Or. App. 511, 873 P.2d 413 (1994). This court need not resolve that question, however, because cap or eliminate is not what the legislature purported to do in enacting ORS 18.540.

The statute does not abolish punitive damages, nor does it limit the amount of punitive damages a jury may award against a defendant or in favor of a plaintiff. No money stays in the tortfeasor's pocket as a result of the statute. The effect of ORS 18.540 is solely to reallocate what would have been the plaintiff's, based on the verdict of the jury, and make it the property of the State. This is a confiscation, not a limitation or elimination.

Perhaps the situation can be seen most clearly by focusing not on what the plaintiff "loses" by operation of the statute, but on what the State gains. In this case, if the State is correct and ORS 18.540 is valid, the State will acquire a large sum of money. That fund does not exist because of any effort by the State. The State had no role in initiating or prosecuting the action. To quote the Court of Appeals in its disposition of the Eighth Amendment "excessive fines" argument in *Tenold*: "In this case, a private party brought an action against defendants, and the jury directly imposed the judgment [sic] against defendants to deter future misconduct." 127 Or.App. at 529.

After the verdict, the funds are not rightfully the defendants', because the jury has awarded punitive damages against them. According to our Supreme Court: "There is nothing that we have found in the language or the legislative history of ORS 18.540 indicating the legislature intended to change the purposes behind punitive damage awards when it enacted a new mandate for the distribution of the proceeds of such awards." *Honeywell v. Sterling Furniture Co.*, 310 Or. 206, 210-11, 797 P.2d 1019 (1990) (holding it was reversible error to instruct the jury on the distribution to the state of a portion [of] punitive damages awarded because it would invite the jury to award the damages for the impermissible purpose of enhancing the Criminal Injuries Compensation Account).

There is no dispute that but for the operation of ORS 18.540, plaintiff would receive the entire punitive damage award. Consequently, the funds at issue are the plaintiff's property, taken by the State without just compensation.

Judgment shall be entered for plaintiff.

Dated this 7th day of July, 1999.

/s/ _____

JANICE R. WILSON
Circuit Court Judge